Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation	)	DA 91-577
of Satellite Earth Stations	)	45-DSS-MISC-93
	)	

To: The Commission

REPLY COMMENTS OF THE NATIONAL LEAGUE OF CITIES; THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; THE NATIONAL TRUST FOR HISTORIC PRESERVATION; LEAGUE OF ARIZONA CITIES AND TOWNS; LEAGUE OF CALIFORNIA CITIES; COLORADO MUNICIPAL LEAGUE; CONNECTICUT CONFERENCE OF MUNICIPALITIES; DELAWARE LEAGUE OF LOCAL GOVERNMENTS; FLORIDA LEAGUE OF CITIES; GEORGIA MUNICIPAL ASSOCIATION; ASSOCIATION OF IDAHO CITIES; ILLINOIS MUNICIPAL LEAGUE; INDIANA ASSOCIATION OF CITIES AND TOWNS; IOWA LEAGUE OF CITIES; LEAGUE OF KANSAS MUNICIPALITIES; KENTUCKY LEAGUE OF CITIES; MAINE MUNICIPAL ASSOCIATION; MICHIGAN MUNICIPAL LEAGUE; LEAGUE OF MINNESOTA CITIES; MISSISSIPPI MUNICIPAL ASSOCIATION; LEAGUE OF NEBRASKA MUNICIPALITIES; NEW HAMPSHIRE MUNICIPAL ASSOCIATION; NEW JERSEY STATE LEAGUE OF MUNICIPALITIES; NEW MEXICO MUNICIPAL LEAGUE; NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS; NORTH CAROLINA LEAGUE OF MUNICIPALITIES; NORTH DAKOTA LEAGUE OF CITIES; OHIO MUNICIPAL LEAGUE; OKLAHOMA MUNICIPAL LEAGUE; LEAGUE OF OREGON CITIES; PENNSYLVANIA LEAGUE OF CITIES AND MUNICIPALITIES; MUNICIPAL ASSOCIATION OF SOUTH CAROLINA; TEXAS MUNICIPAL LEAGUE; VERMONT LEAGUE OF CITIES AND TOWNS; VIRGINIA MUNICIPAL LEAGUE; ASSOCIATION OF WASHINGTON CITIES; AND WYOMING ASSOCIATION OF MUNICIPALITIES.

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REPLY COMMENTS OF THE NATIONAL LEAGUE OF CITIES, ET. AL.

The Local Communities[1] hereby submit the following reply comments in response to the Further Notice of Proposed Rulemaking in the Commission's Report and Order and Further Notice of Proposed Rulemaking, IB Docket No. 95-59, DA 91-577, 45-DSS-MISC-93 (released March 11, 1996) ("FNPRM"), and the opening comments filed in that docket. In the FNPRM,

[1] The Local Communities is a coalition consisting of the National League of Cities, the National Association of Telecommunications Advisors and Officers; The National Trust for Historic Preservation; League of Arizona Cities and Towns; League of California Cities; Colorado Municipal League; Connecticut Conference of Municipalities; Delaware League of Local Governments; Florida League of Cities; Georgia Municipal Association; Association of Idaho Cities; Illinois Municipal League; Indiana Association of Cities and Towns; Iowa League of Cities; League of Kansas Municipalities; Kentucky League of Cities; Maine Municipal Association; Michigan Municipal League; League of Minnesota Cities; Mississippi Municipal Association; League of Nebraska Municipalities; New Hampshire Municipal Association; New Jersey State League of Municipalities; New Mexico Municipal League; New York State Conference of Mayors and Municipal Officials; North Carolina League of Municipalities; North Dakota League of Cities; Ohio Municipal League; Oklahoma Municipal League; League of Oregon Cities; Pennsylvania League of Cities and Municipalities; Municipal Association of South Carolina; Texas Municipal League; Vermont League of Cities and Towns; Virginia Municipal League; Association of Washington Cities; and Wyoming Association of Municipalities.

the Commission sought comment on its recently adopted revised satellite zoning preemption rule to be codified at 47 C.F.R. § 25.104 ("Preemption Rule"), as it relates to the implementation of Section 207 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("Telecom Act"). Among other things, Section 207 directs the Commission to promulgate regulations to prohibit restrictions that impair a viewer's ability to receive direct broadcast satellite ("DBS") service via DBS antennas.

In the FNPRM, the Commission queried, among other things, whether: (i) a prospective approach to preemption, relying solely on waivers would be preferable to the retrospective system of rebuttable presumptions currently in the Preemption Rule; (ii) its presumptive preemption for antennas smaller than one meter is consistent with Congress' definition of "direct broadcast satellite services"; and (iii) the Telecom Act requires the Commission to modify the Preemption Rule insofar as it affects services other than those that deliver video programming or antennas larger than one meter.

In response to these inquiries, industry commenters urged the Commission to adopt a "per se" or "waiver only" rule of preemption so as to eliminate any state or local regulation of one meter satellite antennas, absent a waiver of the rule by the Commission. Additionally, industry commenters took the position -- in direct contradiction of both the language and the legislative history of Section 207 -- that the Preemption Rule properly reaches satellite antennas beyond the narrow class of DBS.

As set forth below, the Local Communities disagree with the industry's positions in their opening comments, as well as the tentative conclusions reached by the Commission in the FNPRM. In addition to these reply comments, we also incorporate by reference the Local Communities' Petition for Reconsideration of the Report and Order portion of the FNPRM, filed April 17, 1996.[2]

I. The Commission Should Reject the "Per Se/Waiver Only" Rule Proposed by Industry.

A. The Adoption of a "Per Se/Waiver Only" Rule Would Merely Exacerbate the Legal Infirmities of the Preemption Rule.

In the FNPRM, the Commission concluded that its Preemption Rule is a reasonable way to implement Congress' intent regarding the prohibition of restrictions on DBS antennas and requested comments on whether "a prospective approach relying solely on waivers would be preferable to our retrospective system of rebuttable presumptions."[3] In response to this query, industry commenters exhorted the Commission to go further and adopt a "per se," or "waiver only" rule of preemption in connection with satellite antennas having a diameter of one meter or less.

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[2] Petition for Reconsideration of the National League of Cities, et. al., IB Docket No. 95-59 (filed April 17, 1996) ("Recon. Petition").

[3] FNPRM at ¶ 59.

Industry commenters asserted that Section 207 sets a higher standard for DBS satellite antennas than the rebuttable presumptions contained in the Preemption Rule.[4] They also argued that Section 207 permits no burdens whatsoever on DBS antennas,[5] and that the rebuttable presumption established in the Preemption Rule is "a far cry" from the prohibition of restrictions required by Section 207.[6] Industry commenters claimed to rely on the language of Section 207 and the preemption language in its legislative history to support their position. These assertions are, however, intellectually disingenuous.

On its face, Section 207 directs the Commission only to promulgate regulations that "prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of . . . direct broadcast satellite services."[7] The legislative history of Section 207 states, in pertinent part:

> The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements. . . that prevent the use of . . . satellite receivers designed for receipt of DBS service.[8]

Thus, the industry commenters conveniently ignored the clear statement in the House Report that the word "impair" as used in Section 207 means "prevent." Accordingly, the Commission's

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[4] See Comments of Primestar Partners L.P. at 7 ("Primestar Comments").

[5] See, Petition for Reconsideration and Clarification and Comments to Further Notice of Proposed Rulemaking of DIRECTV at 6 ("DIRECTV Comments").

[6] See, Further Comments and Petition for Clarification of the Satellite Broadcasting and Communications Association of America at 10 ("SBCA Comments").

[7] Telecom Act, Section 207 (emphasis added).

[8] H.R. Rep. No. 104-204, 104th Cong., 1st Sess., 123-24 (1996) ("House Report") (emphasis added).

preemption of state and local regulations should properly be limited to only those regulations that actually prevent a viewer's ability to receive video programming services through DBS antennas, not to all regulations that "affect" DBS antennas. Rather than acknowledging this limitation of the scope of Section 207, however, industry commenters ignored this clear and unequivocal expression of Congress' intent and exhorted the Commission to go far beyond the statute and the legislative history and adopt a "per se/waiver only" rule prohibiting any state or local regulation affecting satellite antennas having diameters of one meter or less.

In addition to selectively disregarding the legislative history of Section 207, the industry commenters' position rests on a fundamental error in logic. Industry commenters assumed -- as did the Commission in the Preemption Rule -- that any "state or local zoning, land-use, building, or similar regulation "that merely" affects the installation, maintenance, or use of" DBS antennas necessarily impairs or prevents the reception of DBS service.[9] Such a conclusion is not only unsupported by the statute and the legislative history, it is also unsupported by the record and would be unconstitutional. For example, while a local ordinance requiring a homeowner to properly ground and secure a DBS antenna certainly would "affect" DBS antennas, it hardly follows that all such requirements "impair" -- much less "prevent" -- a homeowner's ability to receive DBS service. Yet the Commission's Preemption Rule -- as well as the "per se/waiver only" rule advocated by the industry commenters -- makes just such a cavalier assumption. And neither rule allows the state or local authority to defend its regulation

[9] See SBCA Comments at Exhibit A, Section (b).

on the basis that it does not prevent or impair service. This result defies logic and the language of Section 207.

Thus, adopting a "per se/waiver only" rule would only exacerbate the legal infirmities of the Preemption Rule. The better approach -- one far more rational and consistent with the statutory language and legislative history -- would be for the Commission to simply adopt a rule that prohibits state or local regulations that prevent a viewer from using antennas to receive DBS services. Such a rule would allow persons who believe a particular regulation violates this requirement to petition the Commission for a case-by-case determination. Such a rule would be entirely consistent with the "mandate" of Section 207, and would eliminate the irrational assumptions upon which the Preemption Rule, and those rules suggested by industry commenters here, are based.

B. A "Per Se/Waiver Only" Rule Would Be Inconsistent With The Congressional Intent Expressed in Section 207.

As discussed above and in our Recon. Petition, the Preemption Rule is impermissibly broad in that it presumptively preempts all state and local zoning, land-use, and building regulations that "affect" the use of so-called "small" antennas without regard to whether those regulations actually impair or prevent receipt of video service. The "per se/waiver only" rule, as recommended by industry commenters, would go even further and eliminate the possibility

of justifying state or local regulation of small antennas even on narrowly tailored health or safety grounds, allowing only waivers for local concerns of a "highly specialized or unusual nature."[10]

The Commission, however, has already recognized in the FNPRM that such a sweeping rule would be inconsistent with Section 207. The FNPRM states:

> We note, however, that Congress did not simply preempt all "restrictions that impair a viewer's ability to receive video programming services" from DBS providers. Instead, Congress required that "the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services" from DBS providers. . . Because Congress invoked the Commission's normal rulemaking authority, and because Congress did not prohibit all regulations but rather only those that impaired reception, we think accommodation of local concerns remains permissible under the statute. We think it reasonable to infer that Congress did not mean, for example, to prevent the Commission from preserving reasonable local health and safety regulations. . .[11]

Thus, pursuant to the plain language of Section 207 and by the Commission's own reasoning, state and local governments cannot be prevented from regulating DBS antennas as long as such regulations do not "impair" a viewer's ability to receive video programming services from DBS providers. The "per se/waiver only" rule urged by the industry, in contrast, would improperly preclude any state or local regulation of DBS antennas absent a waiver from the Commission to accommodate extraordinary circumstances. Such a rule is flatly inconsistent with Section 207 and the Commission's own interpretation of that section.[12]

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[10] See SBCA Comments, Exhibit A, Section (b), and DIRECTV Comments, Exhibit A-1, Section (b).

[11] FNPRM at ¶ 59 (emphasis in original).

[12] The Preemption Rule itself is also inconsistent with Section 207 and the Commission's analysis in ¶ 59 of the FNPRM, because it too preempts all state and local zoning, land-use and building regulations that "affect" small dishes, rather than limiting itself to preempting those

II. Section 207 Limits the Commission's Preemptive Power to Restrictions That Impair a Viewer's Receipt of Direct Broadcast Satellite Service.

The FNPRM tentatively concludes that the Preemption Rule's "presumed preemption for antennas smaller than one meter is consistent with Congress' definition of 'direct broadcast satellite services.'"[13] Not surprisingly, industry commenters supported this conclusion.[14]

But, as pointed out in our Recon. Petition, this conclusion simply cannot be squared with the statutory language and legislative history of Section 207. Section 207 speaks not in terms of the size of the antenna, but in terms of the specific type of service that the antenna in question is designed to receive. Thus, the treatment of one-meter satellite antennas as a class in Section (b)(1)(B) of the Preemption Rule is impermissibly overbroad, since (as the FNPRM itself acknowledges at ¶ 60) antennas used for reception of DBS service are invariably smaller than one meter in diameter. Moreover, the FNPRM's conclusion is inconsistent with the fact that Congress took great pains to differentiate between DBS and all other satellite video services. As one industry commenter noted, "Although the legislative history of Section 207 is brief, it clearly indicates that Congress was cognizant of the distinctions between DBS and other satellite services."[15] Thus, the Commission cannot substitute its judgment for that of the Congress and

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regulations that "impair" a viewer's ability to receive video service through DBS dishes.

[13] Id. at ¶ 60.

[14] See, e.g., Primestar Comments at 5.

[15] See Comments of the Consumer Electronics Manufacturers Association at 3. ("CEMA Comments").

should therefore limit the scope of the Preemption Rule to bring it into conformity with Section 207.

III. Section 207 Prohibits the Commission From Adopting A Preemption Rule That Reaches any Satellite Antennas Other Than DBS Antennas.

The Commission tentatively concludes in the FNPRM that the Telecom Act "does not require us to repeal or otherwise modify our preemption rule insofar as it affects services other than those that deliver video programming or antennas larger than one meter."[16] At least one industry commenter agreed with this tentative conclusion.[17]

The Commission's conclusion in this instance is erroneous. Section 207 only authorizes the FCC to promulgate regulations preempting state or local regulations that prevent the use of "satellite receivers designed for receipt of DBS."[18] And by its terms, Section 207 does not apply to C-Band satellite earth stations, FSS antennas, or to transmitting satellite antennas, such as VSAT antennas. The only logical interpretation of the text and legislative history of Section 207 on this point is that Congress intended to limit the Commission's preemptive authority to DBS antennas; otherwise, the provision would be mere surplusage.[19] Hence, to the extent that

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[16] FNPRM at ¶ 61.

[17] See CEMA Comments at 3.

[18] House Report at 124.

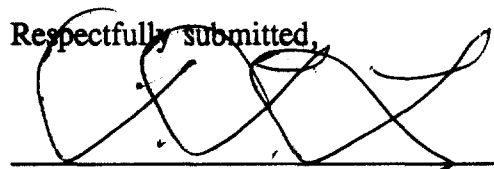
[19] See our Recon. Petition for a more thorough discussion of this issue.

the Preemption Rule contemplates satellite antennas other than those designed for receipt of DBS, it is too broad and must be modified to conform to Section 207.

IV. Conclusion.

The Commission should reconsider its Preemption Rule and instead adopt a rule more in line with Section 207. Such a rule would prohibit any state or local regulation that impairs a viewer's ability to receive video programming through devices designed for the reception of DBS service. Parties believing a particular regulation violates this rule should be allowed to petition the Commission for preemption, with the burden on the petitioning party to prove the regulation impairs its ability to receive DBS service, and the burden on the state or local government to prove that the challenged regulation serves a health, safety, or aesthetic objective and is reasonably tailored to serve that objective. In no event should the Commission adopt a "per se/waiver only" rule of preemption relating to DBS antennas, since such action would only exacerbate the legal infirmities of the current Preemption Rule.

Respectfully submitted,



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